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No. 92-934

In The

Supreme Court of the United States

October Term, 1992

THEODORE B. GOULD,

Petitioner,

vs.

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, AND THE BANK OF NEW YORK,

Respondents.

IN RE HOLYWELL CORP., THEODORE B. GOULD, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORP., AND CHOPIN ASSOCIATES,

Debtors.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT SMITH

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QUESTION PRESENTED

I.

Whether the Court of Appeals erred in affirming contempt orders entered by the courts below where there is no dispute that Petitioner diverted assets of the Miami Center Liquidating Trust to his personal use?

II.

Whether the Court of Appeals erred in affirming the sanctions imposed by the contempt orders entered by the courts below?

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OPINIONS BELOW

The opinions below include the unreported decision of the Court of Appeals (Pet. App. A at 1a); the unreported decision of the United States District Court for the Southern District of Florida (Pet. App. B at 11a); and the unreported decisions of the United States Bankruptcy Court for the Southern District of Florida, titled *Order Finding Theodore B. Gould In Contempt* (Pet. App. at 38a) and *Order Certifying Theodore B. Gould To Be In Contempt* (Pet. App. E at 45a).

STATEMENT OF JURISDICTION

The Petitioner seeks review of a decision by the Court of Appeals, *per curiam* and without decision,[1] which affirmed the lower court's finding of contempt resulting from the Petitioner's diversion of assets of the Miami Center Liquidating Trust (hereinafter "Trust") for his personal use. The Petitioner invokes 28 U.S.C. § 1254(1) to establish this Court's jurisdiction, but has failed to establish any jurisdictional basis for granting the petition for writ of certiorari. He has demonstrated neither the existence of a conflict between the decision of the Court of Appeals for the Eleventh Circuit and any decision of this Court or other Court of Appeals, nor has he demonstrated the existence of an important question of federal law which has not been, but should be settled by

[1] The decision reads "*PER CURIAM*: AFFIRMED. *See* 11th Cir. R. 36-1."

the Court. *See* Sup.Ct.R. 10.1(a)-(c). Accordingly, the petition should be denied.

STATEMENT OF THE CASE

Introduction

The Petitioner is one of five related debtors which he owns, controls and dominates.[2] Each filed simultaneous voluntary Chapter 11 petitions over eight years ago in the United States Bankruptcy Court for the Southern District of Florida. *See Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1548 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988). This is the Petitioner's eleventh visit to this Court.[3]

After "overwhelming" approval by the creditors, on August 8, 1985 the bankruptcy court confirmed the plan of reorganization (hereinafter "Plan") proposed by the debtors' primary creditor, The Bank of New York, over the debtors' objections. *See Holywell Corp. v. Bank of New*

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[2] The debtors are Theodore B. Gould, Holywell Corp., Miami Center Liquidating Partnership, Miami Center Corporation and Chopin Associates.

[3] In addition to this effort to collaterally attack the confirmed plan of reorganization, the Petitioner has unsuccessfully sought review in nine out of his ten prior visits to this Court. *See* Nos. 87-1988, *cert. denied*, 488 U.S. 823 (1988); 87-1989, *Pet. for writ of mandamus denied*, 488 U.S. 814 (1988); 89-864, *cert. denied*, 110 S.Ct. 867 (1990); 89-708, *cert. denied*, 110 S.Ct. 725 (1990); 89-917, *cert. denied*, 110 S.Ct. 1119 (1990); 90-676, *cert. denied*, 111 S.Ct. 713 (1991); 90-761, *cert. denied*, 111 S.Ct. 767 (1991); 90-1551, *cert. denied*, 111 S.Ct. 2259 (1991). *But see Holywell v. Smith*, 112 S.Ct. 1021 (1992).

York, 59 Bankr. 340 (S.D. Fla. 1986). The Plan provided for the creation of the Miami Center Liquidating Trust (hereinafter "Trust"), consisting of all of the debtors' combined assets under 11 U.S.C. § 541(a), and the appointment of a trustee. By order dated August 12, 1985, the court appointed Respondent Smith, who had no prior connection with the debtors or the bankruptcy proceedings. Bankr. C.P. No. 916.[4] Smith's authority to act became effective on October 10, 1985, the date the Plan was implemented.

The Plan substantively consolidated all of the debtors' assets, and directed Smith to sell the largest asset, the Miami Center property, to The Bank of New York (hereinafter "Bank") for $255,600,000. The consideration took the form of cancellation of the Bank's claim (for approximately $242,000,000, including post-petition interest) plus cash. Following the debtors' failure to post a bond to stay implementation of the Plan, the sale of the Miami Center closed, and Smith commenced disbursements to allowed claims as directed by the Plan. *See* Bankr. C.P. No. 1086 and 1254 (First and Second Reports of the Liquidating Trustee, respectively).

Faced with the lack of a stay and the implementation and substantial consummation of the Plan, the debtors, including the Petitioner, were unsuccessful in their appeal of the bankruptcy court's order confirming the Plan. *See Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), *dismissed as moot sub nom, Miami Center*

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[4] "Bankr. C.P. No. ___" refers to the court paper number assigned below.

Ltd. Partnership v. Bank of New York, 838 F.2d 12547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988).

Course of Proceedings

Smith filed a motion to have the Petitioner held in contempt for his unauthorized sale of Trust assets and for his refusal to reveal the whereabouts of or to turn over the sale proceeds. Pet. App. F at 48a.

The bankruptcy court found the Petitioner to be in contempt, required him to disgorge sale proceeds of $67,500 (together with interest, less $1,000 in closing expenses) by a date and time certain, and imposed a $1,000 daily fine should he fail to comply by the appointed time. Pet. App. D at 38a. The fine was payable to the court registry and was to continue until the order was obeyed. *Id.* The court reserved authority to impose further sanctions. *Id.* at 43a.

Following the Petitioner's failure to abide that order, the bankruptcy court certified to the district court that the Petitioner was in contempt. Pet. App. E at 45a.

The district court conducted a *de novo* hearing and entered an order finding the Petitioner in contempt and, like the court below, required him to turn over the sale proceeds. Pet. App. B at 11a. He was given seven days to comply, and was advised that his failure to do so would "result in the imposition of sanctions, including but not limited to a daily fine in the amount of $1,000" for each day until compliance. *Id.*

The district court denied rehearing and the Petitioner's request for a stay, specifically rejecting the relevance of the tax issues, ultimately decided in *Holywell Corp. v. Smith*, 503 U.S. ___, 112 S.Ct. 1021, 117 L.Ed. 2d 196 (1992), to the Petitioner's contumacious acts. Pet. App. C at 28a.[5]

The Court of Appeals affirmed *per curiam* without opinion, Pet. App. A at 1a, and denied rehearing, rehearing *en banc*, and a stay. Pet. App. A at 3a and 8a. This court summarily denied a stay. *Gould v. Smith*, No. 344 (Oct. 30, 1992).

Facts

The facts relevant to the petition, although not in dispute, are not completely or accurately set forth in the Petition.[6]

In October 1981, the Petitioner purchased certain concrete pumps and related equipment. Pet. App. B at 13a. Upon the filing of his Chapter 11 petition in 1985, the concrete pumps and related equipment became assets of his bankruptcy estate pursuant to 11 U.S.C. § 541(a). *Id.* Pursuant to the confirmed Plan, this property became

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[5] The Petitioner erroneously asserts that counsel for the Trustee drew the bankruptcy court's tax decision, ultimately reversed by this Court as cited above. This claim is not only untrue, but *dehors* the record. It should further be noted that Petitioner failed to preserve this "issue" in his appeal of the bankruptcy court's tax decision.

[6] The Petitioner's narrative is argumentative and replete with references to matters that are *dehors* the record, misleading, and irrelevant.

property of the Trust. *Id.* In 1989, the Petitioner was contacted by a purchaser for the concrete pumps and related equipment, but before the sale was consummated, the Petitioner was notified that Respondent Smith claimed the right to this property and any sale proceeds. *Id.* at 14a. He nonetheless contracted for the sale of the property without Smith's consent, and consummated the sale, accepted payment in his name alone, and placed the proceeds in a brokerage account which he refused to reveal. *Id.* He insisted the proceeds were to be used to satisfy taxes arising as a result of implementation of the Plan. App. A at 7, 9-10; Pet. App. C at 36a.

The bankruptcy court certified the Petitioner to be in contempt. Pet. App. E at 45a. Despite having acknowledged that the property belonged to the Trust, App. A at 6-7; B at 2, 10, the Petitioner objected to the contempt order on the ground that Respondent Smith lacked any interest in the property. Pet. App. G at 58a. He also objected on grounds that the bankruptcy court lacked jurisdiction to appoint Respondent Smith as trustee, that the Plan did not bind the Petitioner because it was "unlawful," and that the bankruptcy court lacked jurisdiction after confirmation. Pet. App. G at 57a. The Petitioner failed to raise any objection on the ground that the sanctions imposed were excessive.

At the *de novo* contempt hearing before the district court, the Petitioner stated that he would rely on the court papers and that oral argument or an evidentiary hearing were unnecessary because "[t]his is a symbolic gesture. I want to take this up to the Eleventh Circuit." App. C at 4. He also refused legal counsel. *Id.* at 5.

The district court held him in contempt, finding:

1. The concrete pumps and related equipment were assets of the Petitioner's bankruptcy estate pursuant to Bankruptcy Code Section 541(a), and thereafter became an asset of the Trust pursuant to the confirmed Plan.

2. The Petitioner sold the property in question without authority and refused to disgorge the proceeds.

3. The bankruptcy court had jurisdiction to appoint Smith as Trustee, and that appointment and the establishment of the Trust was the law of the case.

4. The issue of the Trust's responsibility for taxes incurred as a result of implementation of the Plan was addressed in a separate proceeding and was irrelevant to the issue of the Petitioner's conduct.

Pet. App. B at 11a. The court ordered him to turn over the sale proceeds within seven days to the Trustee, imposed a $1,000 daily fine payable to the court registry in order to coerce compliance, and reserved authority to impose additional sanctions. The Petitioner nonetheless refused to comply.

The Petitioner did not argue or offer evidence of an inability to comply at either contempt hearing. When the Petitioner sought rehearing in the district court, App.D, he revealed for the first time that the sale proceeds were no longer in a brokerage account and would not be "saved" to pay taxes, as he had told the bankruptcy court. Pet. App. C at 36a. He claimed he could not comply with the court's directive (and therefore should be

relieved of any duty to do so) because he allegedly used the sale proceeds to pay his attorney in the related tax proceeding. *Id.* App. D at 1. He failed to present any evidence to support this contention.

The district court denied rehearing and the request for a stay. Pet. App. C at 28a. The court determined, Pet. App. C at 31-32a, that the tax issue:

> lies outside the focus of the instant action and the May 17 Order of this Court. As we stated in our Order of May 17, 1991, '[t]he question of whether the trust must pay taxes is not relevant to the issue of ownership of the concrete pumps.' *Id.*, Order at 6. We did *not* premise our contempt order upon the bankruptcy court's 'agreement with the trustee that he is not responsible for the payment of federal income taxes.' [Gould's] Motion for Stay at 3. Nor did we hold that the bankruptcy court had so premised its certification of contempt. *Id.* Rather, we stated clearly and unambiguously that Appellant was to be held in contempt because 'Mr. Gould sold an asset of the Miami Center Liquidating Trust and pocketed the proceeds, without the consent of the Liquidating Trustee and in direct violation of a court order'. *See* Order of May 17, 1991 at 6.

Id. at 31a-32a.

The court rejected the Petitioner's reasoning in its entirety, Pet. App. C at 32a:

> Mr. Gould argues that if the Supreme Court reverses the Eleventh Circuit's determination that the Trust is not responsible for the claimed taxes, and if Mr. Gould then brings an action for breach of fiduciary duty against the Liquidating

> Trustee for not paying those taxes, and if Mr. Gould then obtains a judgment against the Liquidating Trustee, and if that judgment includes as damages Mr. Gould's attorney's fees in appealing the tax decision, then perhaps he could not be held in contempt for diverting trust proceeds and using the assets for his own purposes. Mr. Gould's argument is speculative and hypothetical. Moreover, even if he should prevail as to the tax matter, the underlying realities of the instant action remain the same: Mr. Gould sold a Trust asset, kept the proceeds, and took such action without the consent of the Liquidating Trustee and in direct violation of a court order. It is for these things that he was found in *civil* contempt of court and directed to comply. We have heard nothing new or different. . . .

The district court rejected the Petitioner's claim that he could not be held in contempt because he was unable to comply with the court's order, having allegedly used the money to pay his attorneys. The court noted his misrepresentations concerning the disposition of the sale proceeds, stating that his "representations conflict directly with those he made in proceedings before the bankruptcy court. . . . " *Id.* at 35a.

The Court of Appeals affirmed *per curiam*, citing only Rule 36-1 of the Rules of the United States Court of Appeals for the Eleventh Circuit. That rule provides the court may affirm an order without opinion when an opinion would have no precedential value and when, *inter alia*, the district court's judgment is based on findings of fact that are not clearly erroneous, is supported by the record, and has been entered without an error of law.

SUMMARY OF ARGUMENT

This proceeding involves a garden variety contempt mischaracterized by the Petitioner as a malevolent scheme to deprive him of a supposed right to take property of the Trust in utter disregard of judicial process. The Petitioner does not contest the facts which led to his contempt, nor does he present the Court with any recognized basis for granting review. The finding of contempt based on the Petitioner's undisputed misconduct is not ordinarily the basis for review in this Court, which does not grant certiorari to review findings of fact. After filing a voluntary Chapter 11 petition in the bankruptcy court, the Petitioner sold assets that no longer belonged to him, without authority, and pocketed the proceeds. He refused to say where the money was and would not obey a court order to turn it over. Only after two contempt hearings and the district court's affirmance of the contempt order did he claim he should be relieved of the duty to turn over the funds because the money had been spent on attorney's fees in a related proceeding in which he and the United States of America prevailed over the Respondents. He never, however, offered any evidence to support his belated claim of "inability to comply."

The Petitioner relies largely on this Court's tax decision and collateral attacks on the Plan as his defense. Any issue concerning the Court's tax decision in this case is irrelevant to the issue of contempt. Furthermore, any issues concerning the propriety of the confirmation of the Plan is no longer subject to review. These "issues" are red herrings.

The imposition of sanctions in this case was in conformance with the law. The monetary sanctions imposed were expressly designed to coerce compliance with a

valid order. The Petitioner's effort to invoke the Excessive Fines Clause of the Constitution is, therefore, without merit.

Supreme Court Rule 10 authorizes certiorari review where there is a demonstrable conflict between the Courts of Appeals or with a decision of the Court, or where there exists an important question of federal law which has not been, but should be settled by the Court. These considerations, "while neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons that will be considered." Sup.Ct.R. 10.1. The Petitioner's writ satisfies none of the requisites.

Accordingly, the writ should be denied.

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

The Petitioner has attempted to cloud this plain and simple contempt proceeding with collateral attacks on the confirmed and substantially consummated Plan, and by gratuitous, untruthful attacks on the Trustee and his counsel. This effort, however, fails to address the facts of the case and the law of contempt. None of the reasons stated warrant review by this Court.

A. PETITIONER MAY NOT COLLATERALLY ATTACK THE PLAN TO EVADE CONTEMPT

The Petitioner contests the Plan in an effort to evade the consequences of his misconduct. This is not his first

collateral attack, nor likely his last.[7] This effort fails because, as the district court noted below, the Plan has been confirmed and has been the law of this case since 1985. Pet. App. B at 17-18a. *See Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), *dismissed as moot sub nom, Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988). The confirmation of the Plan is no longer subject to review. The Plan, moreover, is binding on the Petitioner. Pet. App. B at 18a. *See* 11 U.S.C.. § 1142.

Assuming *arguendo* the plan is flawed, *infra* at 13, a contempt proceeding nonetheless "does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience." *Maggio v. Zeitz*, 333 U.S. 56, 69 and 75, 68 S.Ct. 401, 75 L.Ed.2d 521 (1983). *United States v. Rylander*, 460 U.S. 752, 756-757, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983).

Accordingly, the Petitioner's collateral attack on the Plan fails.

1. The Tax Decision is Irrelevant

The Petitioner relies on this Court's tax decision in *Holywell Corp. v. Smith*, 503 U.S. ___, 112 S.Ct. 1021, 117 L.Ed.2d 196 (1992), to support his claim that the Plan does not bind him and that the Plan and Respondent's Smith's

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[7] *See n.* 3.

appointment was unlawful. This Court determined in its decision that the Trust is responsible for the tax consequences of the Plan, even though the Plan failed to provide for payment of any such taxes. *Holywell*, 112 S.Ct. 1021. The Court determined that the substantially consummated Plan was not binding on the federal government for tax purposes because 26 U.S.C. § 6012(b) imposes on the Trust an independent tax obligation.[8] As the lower court so aptly noted, the tax issue has nothing to do with the contempt proceeding against the Petitioner for his diversion of Trust assets to his personal use in violation of a court order. Pet. App. C at 21a.

Respondent Smith agrees that the failure of the Bank's Plan to address its tax consequences or to provide funds to satisfy tax liabilities is a flaw which may have prevented confirmation had such an objection been properly raised.[9] That is why in the bankruptcy court adversary complaint filed in 1987, Smith sought to obtain a declaratory judgment of his tax obligations. He included in that complaint a claim against The Bank of New York, as the Plan's proponent, in the event the Trust was deemed responsible for taxes. As the Petitioner notes, the district court has not scheduled remand proceedings on

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[8] The Petitioner misstates the scope of the Court's tax decision. A plain reading demonstrates the Court did not address any alleged breach of duty by Respondent Smith, and that "issue" was not before the Court. Nor did the Court rule that the tax authorities would be entitled to seize the accounts of the Trustee, his counsel and his accountants. The Petitioner's gratuitous commentary are part and parcel of his *in terrorem* tactics.

[9] Respondent Smith was a stranger to the bankruptcy proceedings prior to confirmation of the Bank's Plan.

Respondent Smith's remaining claims against the Bank.[10] The Petitioner, however, fails to demonstrate how the Court's tax decision is relevant to the contempt proceedings.

B. THE LOWER COURT HAD JURISDICTION TO HOLD THE PETITIONER IN CONTEMPT

The lower court's jurisdiction in this matter is beyond dispute. The Bankruptcy Code, decisional law, and the Plan itself grant the bankruptcy court continuing jurisdiction post-confirmation over matters concerning implementation and execution of the Plan. Pet. App. B at 16-18a; *See* 11 U.S.C. § 1142(b); *Goodman v. Phillip R. Curtis Enters., Inc. (In re Goodman)*, 809 F.2d 228 (4th Cir. 1970); *Harlow v. Palouse Producers, Inc.*, 56 Bankr. 794 (9th Cir. B.A.P. 1985).

C. THE LOWER COURT'S FINDINGS OF FACT WERE NOT CLEARLY ERRONEOUS

The Petitioner cannot and does not genuinely contest the findings of fact which led to the contempt orders entered below. He admitted he sold Trust assets without authority and diverted the sale proceeds to his personal use. He has defied two orders directing him to return these proceeds. This Court does not grant certiorari to review findings of fact. *See Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Berenyi v. District*

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[10] In the tax proceedings, the lower courts did not address the Trustee's claims against the Bank because they ruled the Trust had no tax responsibility.

Director, Immigration and Naturalization Service, 385 U.S. 630, 87 S.Ct. 666, 17 L.Ed.2d 656 (1967); *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951).[11]

D. THE LAW ON CONTEMPT WAS PROPERLY APPLIED

The lower courts properly applied the law of contempt to the facts in this case. The misappropriation of Trust assets is itself contemptuous. *See Wolfe v. Coleman*, 681 F.2d 1302 (11th Cir. 1982). The refusal and failure to comply with the lower courts' orders to turn over the sales proceeds is an additional contempt. *See Maness v. Meyers*, 419 U.S. 449 (1984); *Lindsey v. Ipack*, 732 F.2d 619 (8th Cir. 1984). It is not disputed that all federal courts have the power to impose sanctions against recalcitrant parties, *see Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440,

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[11] The Petitioner seeks review on the ground that, *inter alia*, the Trustee's counsel drew the bankruptcy court's contempt order. This argument lacks merit. He failed to raise this issue on appeal to the district court and is precluded from doing so now. *See Martinez v. Matthews*, 544 F.2d 1233 (5th Cir. 1976); *Pierre v. United States*, 525 F.2d 933 (5th Cir. 1976). At the *de novo* hearing in the district court, the Petitioner not only failed to raise the issue, but failed to present any evidence that the bankruptcy court did not independently review the proposed order. The procedure utilized below is neither suspect nor invalid. *See Anderson v. Bessemer City*, 470 U.S. 564 (1985). This argument is further weakened by the fact that Petitioner stipulated to the facts contained in the order, App. A; B, the order entirely comports with the bankruptcy court's oral ruling at the hearing, App. B at 11-13, and the district court affirmed after a *de novo* hearing in its own lengthy order. The Petitioner's argument thus lacks merit.

1447 (11th Cir. 1985), and that an order *must* be obeyed until it is reversed. *See Maness, supra.* In *Maness v. Meyers,*[12] Chief Justice Burger opined:

> We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person believes an order is incorrect the remedy is to appeal, but absent a stay he must promptly comply with an order pending appeal- . . . . the orderly administration of justice by the courts requires that an order issued by the court . . . . must be obeyed until it is reversed by orderly and proper proceedings.

The Petitioner did not comply; he did not obtain a stay; and the order is valid. Under these circumstances, the propriety of the contempt order cannot be disputed.

1. Self-Created Inability to Comply Offers No Defense to Contempt

The Petitioner nonetheless argues that the contempt orders conflict with *United States v. Rylander,* 460 U.S. 752, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983), and *Donovan v. Mazzola,* 761 F. 2d 1411 (9th Cir. 1985), because the lower courts failed to consider that his inability to comply is a "complete defense." Pet. at 63. The Petitioner misstates the law and how it was applied in this case.

While inability to comply with a court order may sometimes be a defense to a contempt proceeding,[13] it

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[12] 419 U.S. at 458-459, 95 S.Ct. at 591.

[13] *See Rylander, supra; Maggio v. Zeitz,* 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed.2d 476 (1948); *Pesaplastic, C.A. v. Cincinnati Milacron Co.,* 799 F. 2d 1510 (11th Cir. 1986).

does not preclude a finding of contempt when, as here, a contemnor has created the inability to comply himself. *See Piambino v. Bestline Products, Inc.*, 645 F.Supp. 1210 (S. D. Fla. 1986). Inability to comply with a court order *must* be established at the contempt hearing, *Piambino, supra,* and a contemnor *must* demonstrate that he has done his "utmost to comply." *See Phoenix Marine Enterprises, Inc. v. One (1) Hylas 46' Convertible Sportsfisherman Hull No. 1,* 681 F. Supp. 1523 (S.D. Fla.), *aff'd,* 846 F.2d 753 (11th Cir. 1988).

The undisputed record demonstrates that the Petitioner made no effort to comply with the courts' orders, and failed to offer any evidence of his alleged inability to comply. While a contemnor may assert a present inability to comply, it is the contemnor's burden to produce evidence to support the claim. *See Rylander,* 460 U.S. at 757; *McPhaul v. United States,* 364 U.S. 372, 379, 81 S.Ct. 138, 5 L.Ed.2d 136, (1960); *Maggio v. Zeitz,* 333 U.S. at 75-76; *Oriel v. Russell,* 278 U.S. 358, 366, 49 S.Ct. 173, 73 L.Ed. 419 (1929). The Petitioner failed to submit any evidence that would support his new defense. Moreover, the Petitioner failed to even raise this defense until after the district court affirmed the contempt order. Evidence (as opposed to a bare assertion) of inability to comply must be presented at the time of the contempt hearing. *See Rylander,* 460 U.S. at 757, 760-761. Under these circumstances, there is no conflict with *Rylander, Maggio,* or *Donovan,* and the Court of Appeals did not err in affirming the contempt order.

E. THE SANCTIONS IMPOSED ARE IN CONFORMANCE WITH THE LAW

The Petitioner misreads controlling decisional law concerning the sanctions imposed. Civil contempt sanctions may be imposed to coerce compliance with a court order and to compensate the claimant for actual losses sustained as a result of a contemnor's actions. *See United States v. United Mine Workers of America*, 330 U.S. 258 (1947); *Granfinanciera, S.A. v. Nordberg (In re Chase & Sanborn Corp.)*, 872 F. 2d 397, 400-401 (11th Cir. 1988).

A coercive fine such as in this case was properly required to be paid into the court registry. *United Mine Workers*, 330 U.S. at 304. The $1,000 daily fine was imposed after considering the magnitude of the harm threatened by the Petitioner's continued contumacy and the probable effectiveness of the sanction in bringing about the desired result. *See United Mine Workers*, 330 U.S. at 304.

The district court's imposition of sanctions fully complies with the guidelines in *United Mine Workers*. The court ordered the Petitioner to comply with the bankruptcy court's order by directing him to turn over the $67,500 received from the sale of the concrete pumps and related equipment, together with any interest earned on or since the time of the sale, less $1,000 in expenses incurred in consummating the sale. The court gave him seven days to comply, stating that his failure to do so "shall result in the imposition of sanctions including, but not limited to, a daily fine in the amount of $1,000 per day for each day Mr. Gould may fail to comply." Pet. App. B at 26-27a.

In following the directive to "consider the character and magnitude of the harm threatened by the contumacy, and the probable effectiveness of any suggested sanction bringing about the result desired," *Chase*, 872 F. 2d at 401, the lower courts noted the Petitioner's intentional misappropriation of trust assets, his refusal to reveal the whereabouts of the sale proceeds, his misrepresentations concerning the disposition of the sale proceeds, his overt disrespect for the judicial process, and his frustration of the Trustee's ability to perform the duties of the Trust.

In imposing contempt sanctions, a court should select the least possible power adequate to obtain the desired result. *See Spallone v. United States*, 493 U.S. 265, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990). It can safely be surmised that a reasonable person would comply with a directive to turn over $67,500 rather than face a $1,000 daily fine. But then, a reasonable person would not have misappropriated the funds in the first place.

Accordingly, the sanctions imposed conform with the law and there is no violation (let alone applicability) of Amendment VIII to the Constitution.

CONCLUSION

For all of the foregoing reasons, the writ should be denied.

Respectfully submitted,

HERBERT STETTIN, ESQUIRE
Counsel of Record
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HERBERT STETTIN, P.A.
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Tel. (305) 374-3353
Counsel for Respondent Smith

APPENDIX A

[p. 1] THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 84-01590/91/92/93/94-BKC-SMW

IN RE:
HOLYWELL CORPORATION, et al.,
debtors.

One S.E. 3rd Avenue
Miami, Florida
Thursday, July 19, 1989
1:10 P.M. – 1:25 P.M.

DEPOSITION OF THEODORE GOULD

Taken before ELLIOTT MARSHALL, A.S., Registered Professional Reporter and Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition in the above cause.

[p. 2] – APPEARANCES –

On behalf of the Liquidating Trustee

HERBERT STETTIN, ESQ., of the firm of STETTIN & STETTIN

On behalf of the debtors

Pro Se

On behalf of the Bank of New York

HARVY ZIEGLER, ESQ., of the firm of KIRKPATRICK & LOCKHART
and

VANCE SALTER and
KATHRYN HEISE,
ATTORNEYS AT LAW, of the firm of
COLL, DAVIDSON, CARTER,
SMITH, SALTER & BARKETT

ALSO PRESENT

Fred Stanton Smith

Randolph Segal

- INDEX -

WITNESS	DIRECT	CROSS
THEODORE GOULD		
BY MR. STETTIN	3	-

- EXHIBITS -

TRUSTEE'S	FOR IDENTIFICATION
Comp. No. 1	4
No. 2	10
No. 3	12

[p. 3] Thereupon -

THEODORE GOULD

was called as a witness by the Liquidating Trustee and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STETTIN:

Q. Mr. Gould, let's talk about the concrete pumps. Would you tell me, please, sir, when those pumps were acquired?

A. I believe I purchased them in 1981, perhaps late 1980.

Q. Let me show you what appears to be an invoice from Morse Diesel, Inc., to your attention, on behalf of Miami Center Limited Partnership, dated July 3, 1981, a billing from Diesel Construction, a division of Morse Diesel, Inc., and what looks to be a photocopy of a check issued by you in payment of those bills, and ask you if you recognize them (Handing).

A. (Witness examines documents.)

Yes, I recognize them.

Q. In fact, do they represent the purchase documents showing that you bought those concrete pumps back in 1981?

[p. 4] A. Yes.

MR. STETTIN: Mark them as Trustee's Composite Number 1 today, Marshall.

(Thereupon, the documents referred to was marked as Trustee's Composite Exhibit 1 for Identification.)

BY MR. STETTIN:

Q. Thereafter, after the Chapter 11 proceeding was filed, and after the Order of confirmation became effective, what became of those concrete pumps, sir?

A. Well –

Q. I'll break it down.

Were these concrete pumps used in the business of Holywell Corporation in the Miami Center prior to the filing of the bankruptcy?

A. Yes.

Q. And were they used to complete whatever work was required during the pendency of the Chapter 11 proceedings?

A. No.

Q. Were they stored during that period of time?

A. Yes.

Q. Where?

[p. 5] A. They were initially stored on the – what is referred to as the condo parcel, which is the Worth – sometimes referred to as the Worth property. Since Worth never had anything to do with it, Miami Center's Joint Venture property.

Q. Did the pumps remain there until they were disposed of earlier this year?

A. No. Sometime in 1987, I believe, or perhaps 1986 – I don't really recall – they were placed in an area that represents an easemnent between Phase I and Phase II.

Is that right next door, abutting the Miami Center property?

A. It's property abutting the joint venture property. Yes.

Q. Did there come a time early in the year 1989 when efforts were made to sell those concrete pumps?

A. I don't recall when. My – I wouldn't say it was early in the year.

My recollection is that I received a telephone call from a Larry McMillan in June or perhaps it was late May of 1989.

Q. What was the purpose of the call?

A. He asked if I owned the pumps. I said I [p. 6] did. All right? He asked me if I was willing to sell the pumps pumps. I said I was. He asked me what the price was; I said it was $75,000. He came up with a slightly lower price, we split the difference, and I agreed to sell him the pumps for $67,500. All right?

Q. Were you notified, prior to the time that the sale was consummated, that Fred Stanton Smith, as liquidating trustee, was claiming the right to the pumps or proceeds from the sale of the pumps?

A. No.

Q. Are you saying that no one notified you, neither Mr. McMillan nor anyone else, that there was a question raised by Fred Smith about his ownership of those pumps?

A. Excuse me. McMillan's attorney, in an indirect communication, informed me that he would like to place the funds in escrow.

Q. Is that a man named Lotspeich?

A. I don't know. I never spoke to him.

Q. Did he say why he wanted to put the funds in escrow?

A. He said he had spoken – again, this is hearsay; all right? but my understanding is that he had spoken to you, and that you had indicated that [p. 7] the trustee claimed title to the pumps.

Q. What did you say to Mr. Lotspeich? That's the name of the gentleman.

A. I didn't speak to Mr. Lotspeich. I had no contact with Mr. Lotspeich.

Q. Who did you speak to?

A. Mr. McMillan.

Q. What did you say to Mr. McMillan concerning the request to put the money from the purchase in escrow?

A. No deal.

Q. Why?

A. Why?

Q. Yes, sir.

A. Because the trust has been formed for unlawful purposes – all right? – to avoid the payment of Federal and State income taxes.

The $67,500 represents taxable income to my bankruptcy estate for the year 1989; okay? And if I allowed the funds to be placed in what I consider an unlawful trust, they would perhaps be used for other purposes. All right?

And clearly, they – the first thing that has to be done with those funds is pay the income taxes related to that taxable income.

[p. 8] Q. Will you agree with me that those concrete pumps were a part of your Chapter 11 estate on the filing of the Chapter 11 proceedings?

A. There's no question about that. And I do not deny it. And the proceeds, the $67,500, less the net $1,000 in expenses that I paid to give McMillan and his associates access to the pumps, so that they could view them and then later on remove them, represent part of my bankruptcy estate, as opposed to assets that are properly belonging to me as a discharged debtor.

Q. Did you insist to Mr. McMillan that unless the checks were payable to you, and you only, that you would not authorize the sale and would not permit those pumps to be sold?

A. I don't think that issue ever arose. I don't think the question of whether the check was made payable solely to me had arisen.

I think the question that arose was whether I would agree to place the funds in escrow; all right? And I said no.

Q. Did you receive the proceeds in the form of a cashier's check for $67,500, payable to you only?

A. Yes.

[p. 9] Q. Let me show you a customer copy portion of the check and ask you if that refreshes your memory.

Is that a copy of the cashier's check that you got?

A. Well, it's not a question of refreshing my memory. I already answered yes, I did receive it as a cashier's check, and I presume that this is the check itself.

Q. It's the customer portion of it.

A. Okay. There should be – the customer portion?

Q. Yes. It's the second copy of the cashier's check. The bank gets the original.

A. Okay. Well, they should have – obviously, the bank should have something upon which this check was drawn – an executed check with my name on it.

Q. I agree. Did you get this check, the original of the check, and keep the proceeds from it?

A. The proceeds have been invested. Yes.

Q. I'll get to that.

A. Less the $1,000.

MR. STETTIN: I'll get to that. Mark the [p. 10] check as Trustee 2.

(Thereupon, the document referred to was marked as Trustee's Exhibit 2 For Identification.)

BY MR. STETTIN:

Q. Where is the $67,500, less the thousand dollars, presently?

A. Invested in GMAC 30-day paper at 9.21% interest.

Q. In whose name is the account held?

A. In my name.

Q. At which brokerage firm?

A. At this stage, since I don't think that you have any business knowing, since my position is that you represent a trustee who has been unlawfully appointed for the purpose of avoiding the payment of taxes, I'm not going to tell you.

Q. If ordered by the Court to turn it over, will you turn it over?

A. No.

Q. Let me show you a copy of the agreement dated June 2, 1989 between yourself –

A. Before we do that, let me finish.

Q. Yes, sir.

A. Okay? If ordered by the Court to turn it [p. 11] over, or a sanction is imposed upon me for not turning it over, I will not turn it over because my good friends here, and perhaps you too, or maybe even the Court, would then moot – or demand that the Court to which we appeal – to which I appealed Judge Weaver's decision – moot the appeal. And the Court above would have to do that on the grounds that it lacked jurisdiction, since there would be no dispute, no controversy.

So I will not turn over the funds until there is a resolution of the trustee's responsibility for the payment of income taxes for the bankruptcy estate, since I consider Judge Weaver's decision with respect to the income taxes,

that is the trustee's lack of responsibility – I consider that null and void.

Q. Let me show you this agreement dated June 2, 1989, between yourself as seller and Lawrence G. McMillan, trustee, as purchaser. This one is signed by Mr. McMillan. And I ask you, is this a copy of the original which you did sign?

A. (Witness examines documents.) You know –

Q. Off the record for a minute.

MR. STETTIN: I will withdraw the last question.

[p. 12] BY MR. STETTIN:

Q. Is the copy of the agreement of June 2, 1989, attached to your Answer to Motion for Contempt and other relief, a true copy of the agreement signed between you and McMillan for the purchase of these concrete pumps?

A. Yes, it is.

MR. STETTIN: Mark it as 3. You can do it when we get a chance.

I don't have anything further to ask on direct examination.

(Thereupon, the document referred to was marked as Trustee's Exhibit 3 For Identification.)

THE WITNESS: I have no cross-examination.

MR. STETTIN: Do you waive the reading and signing?

THE WITNESS: I waive the reading and signing.

CERTIFICATE OF REPORTER

STATE OF FLORIDA :
: SS.
COUNTY OF DADE :

I, ELLIOTT MARSHALL, A.S., being a Registered Professional Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that I reported the deposition of Theodore Gould, a witness called by the Liquidating Trustee in the above-styled cause; that the said witness was duly sworn by me; that the reading and subscribing of said deposition were waived by the witness and by counsel for the respective parties; and that the foregoing pages, numbered from 1 to 10, inclusive, constitute a true and correct transcription of my shorthand report of the deposition by said witness.

I further certify that I am not an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

WITNESS my hand and official seal in the City of Miami, County of Dade, State of Florida, this 24th day of July 1989.

/s/ Elliott Marshall
Notary Public in and for
the State of Florida at large

My Commission Expires
September 17, 1992

APPENDIX B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
Judge Sidney M. Weaver

In the Matter of:

HOLYWELL CORPORATION, Debtor. Case No. 84-01590-BKC-SMW

_____X

APPLICATION OF FRED STANTON SMITH, TRUSTEE, OF THE MIAMI CENTER LIQUIDATING TRUST, FOR INTERIM COMPENSATION AND REIMBURSEMENT OF EXPENSES; MOTION FOR DETERMINATION OF RIGHT TO AND AMOUNT OF ADMINISTRATIVE EXPENSES CLAIMED BY TURNER CONSTRUCTION COMPANY; MOTION FOR CONTEMPT and FINAL EVIDENTIARY HEARING RE: REMAND FROM U.S.D.C. (ADVERSARY CASE #84-01590-BKC-SMW-A)

July 27, 1989

The above-entitled cause came on for hearing before the HONORABLE SIDNEY M. WEAVER, one of the Judges of the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, at 51 Southwest 1st Avenue, Miami, Dade County, Florida, on Thursday, July 27, 1989, commencing at or about 1:30 p.m., and the following proceedings were had:

REPORTED BY: Jaclyn M. Ouellette

* * *

number. We are going to handle this, assuming it can be resolved, the way we did the ad valorem taxes. That is, the liquidating trustee will make a presentation and a

series of representations to the Court on why he believes it's a settlement in the best interest of the trust, Mr. Gould is going to be free to put on whatever testimony or evidence or argument he feels is appropriate as to why it is not, and the Court will then make its own determination again.

If that is acceptable to the Court, we would ask that you set it over until next week.

THE COURT: Let me find out what dates I have.

MR. STETTIN: Yes, sir.

THE COURT: While we're doing that, let's go on with the other matter.

MR. STETTIN: The one remaining matter that we have set for hearing today, Your Honor, is called the concrete pumps matter.

I'll give you the background, Judge. You entered an order based on that motion setting the matter for hearing today on the following facts.

Sometime prior to the filing of the petition initiating these proceedings, sometime back I believe in 1981, Mr. Gould individually purchased concrete pumps and some related equipment for some just under $500,000. Those concrete pumps were used in the operations of the Debtors prior to bankruptcy.

At the time of the filing of the petition initiating the proceedings, Mr. Gould's Chapter 11, those pumps, the property in question, became part of his estate under Section 541(a).

After confirmation, those pumps remained on the Miami Center premises at various locations, sometimes stored nearby, sometimes stored right next to.

Earlier this year, an opportunity to sell those pumps arose. The Court will recall under the terms of the plan of reorganization, all of the Debtors' 541(a) property, all of it, became property of the liquidating trust. Those concrete pumps and related equipment became part of the liquidating trust.

That was in '85. In 1989, Mr. Gould was approached by someone, a man named Larry McMillan from Kansas City with an offer to buy those pumps. Mr. Gould was advised before the sale was consummated that the liquidating trustee claimed the right to receive the proceeds. The price was $67,500, it was a negotiated sum and that was the number agreed upon.

Mr. Gould knew before he consummated the sale that the liquidating trustee wanted the monies paid to the liquidating trust. As a matter of fact, there was even – there will be some testimony if needed to the fact that what we did was we agreed we'd put the money in escrow and let the Court make the determination.

Mr. Gould said no, no sale will occur unless I sell the pumps. He did. On June 1st or June 2nd, the pumps were sold.

THE COURT: Just one moment, please.

(Off the Record.)

THE COURT: Is Tuesday afternoon too short?

MR. STETTIN: No, it isn't, Judge, if we can do it this way. If we have a deal it's easy, it seems to me. We can do it in an hour on Tuesday afternoon. If we don't have a deal, then it's a full blown trial and what will [sic] do is simply announce it and you will pick another trial date.

THE COURT: I have all Tuesday afternoon.

Are you going to be ready for trial on Tuesday?

MR. ZIEGLER: Yes.

MR. STETTIN: Good.

THE COURT: All right.

MR. STETTIN: Tuesday afternoon at what time, sir?

THE COURT: Mr. Gould?

MR. GOULD: Mr. Stettin is conducting the trial, so unless they agree to the settlement –

THE COURT: All right, Tuesday afternoon, then, at 1:30.

MR. STETTIN: Yes, sir.

THE COURT: This is the remand, right?

MR. STETTIN: Yes, sir.

THE COURT: Will you draw me an order, then, just to clear up the record?

MR. STETTIN: I will.

THE COURT: You all come in in any event whether it's settled or we will go to trial. All right.

Proceed, then.

MR. STETTIN: A contract for the purchase and sale of those units, the concrete pumps, was signed by the parties dated June 2nd, 1989. A cashier's check for $67,500 was drawn payable to Mr. Gould and received by Mr. Gould.

Mr. Gould had his deposition taken by me after we learned of all of this and filed this motion for contempt and I made demand on Mr. Gould to turn the money over and Mr. Gould refused to. I asked Mr. Gould where the money was.

Well, let me read just very brief selected portions of his deposition. This is Mr. Gould's deposition, Page 7:

"Q. What did you say to Mr. McMillan concerning the request to put the money from the purchase into escrow?

"A. No deal.

"Q. Why?

"A. Why?

"Q. Yes, sir.

"A. Because the trust has been formed for unlawful purposes, all right, to avoid the payment of federal and state income taxes.

Page 8:

"Q. Will you agree with me that those concrete pumps were a part of your Chapter 11 estate on the filing of the Chapter 11 proceeding?

"A. There is no question about that and I do not deny it and the proceeds, the $67,500,

less the $1,000 in expenses that I paid to give McMillan and his associates access to the pumps so that they could view them and then later on remove them, represent part of my bankruptcy estate as opposed to assets that are property belonging to me as a discharged Debtor."

He continued:

"I think the question that arose was whether I would place, agree to place the funds in escrow, all right, and I said no.

"Q. Did you receive the proceeds in the form of a cashiers check for $67,500, payable to you only?

"A. Yes.

"Q. Did you keep the proceeds?"

Page 10:

"A. The proceeds have been invested.

"Q. Where is the $67,500 less the thousand dollars present?

"A. Invested in GMAC 30 day paper at 9.21 percent interest.

"Q. In whose name is the account held?

"A. In my name.

"Q. At which brokerage firm?

"A. At this stage, since I don't think that you have any business knowing, since my Position is that you represent a trustee who has been unlawfully appointed for the purpose of avoiding the payment of taxes, I'm not going to tell you.

"Q. If ordered by the Court to turn it over, will you turn it over?

"A. No.

He continued:

"Before we do that, let me finish."

This is Mr. Gould.

"Q. Yes, sir.

"A. Okay, if ordered by the Court to turn it over or a sanction is imposed upon me for not turning it over, I will not turn it over because my good friends here" –

Pointing to Mr. Salter and Mr. Ziegler.

"and perhaps you, too, or maybe even the Court, would then moot or demand that the Court to which we appeal, to which I appeal Judge Weaver's decision, moot the appeal and the Court above would have to do that on the ground that it lacked jurisdiction since there would be no dispute, no controversy, so I will not turn over the funds until there is a resolution of the trustee's responsibility for the payment of income taxes for the bankruptcy estate since I considered Judge Weaver's decision with respect to the income taxes, that is the Trustee's lack of responsibility, I consider that null and void."

Now, I can go on, Judge, but the substance of it is I don't think we have any dispute as to facts. We have property that belonged to the Debtor's estate at the filing of the 11. By the terms of the plan it became part of the liquidating trust.

The Debtor, after discharge, knowingly and willfully sold that property knowing that the trust wanted the money, the proceeds from it and he refused to turn it over. To compound it, not only did he take property which he knew belonged to the liquidating trust, he now will not tell us where it is and he has announced in advance that he will not abide your order because you have made a ruling on the income tax decision which he considers to be null and void.

With due respect, Judge, that is contemptuous behavior. I will proffer for the Court that I have evidence as to every one of these items. I think I have read Mr. Gould's deposition and I will make all of these a part of the record. I have taken the deposition of the lawyer for Mr. McMillan, Brad Lockspeech (phonetic), I have taken the deposition of the lawyer who represented Mr. Gould, a man named Ethan Ninsky (phonetic), and I have the documents marked in every one of those depositions. They all say the same thing. Mr. Gould knowingly and willfully took property belonging to the liquidating trust and sold it and refuses to account for the money and will not abide by this Court's order, he says.

MR. GOULD: I just want to add one thing.

The $67,500 represents interest, taxable interest income for the year 1989, in my bankruptcy estate. You have reached the decision that the trustee is not responsible for the payment of federal and state income taxes.

You have not decided who is liable, who is responsible for filing the returns or paying the taxes. If in fact Judge Kehoe affirms your decision, and I give the $67,500 less the $1,000 plus interest, it's now $68,000, actually, to

the trustee and he uses it for the payment of pre-petition claims or for the administrative expenses of the trust, then I'll be responsible, I have a fiduciary responsibility to pay the income taxes associated with that in 1989.

What Mr. Stettin is asking me to do and what you would be asking me to do is to turn over these assets and then not have the funds to pay statutory tax liabilities. I believe that I have the responsibility to insure that the funds are available for the payment of the taxes.

That's my position. It's as simple as that.

Now, there is no question that the trust was created for the purpose of avoiding the payment of taxes. The bank has conceded that.

What you have done, I regret to say, is that you have placed me in the position, and it's very awkward for me, I have the responsibility, if the trustee does not, to file the returns. If I file the return, or when I file the return, I have to pay the taxes.

If your order is affirmed, as you recall, all you have done is you have relieved the trustee of the responsibility for filing returns and paying the taxes. If somebody can explain to me how I can turn the funds over and be discharged of any tax liability and any responsibility to file the return for 1989, I would be very happy to do that.

So far, nobody has done that. All they have done is say give me the asset. We are not responsible for the liabilities associated with it, just give me the assets.

I think there is something wrong with that and I'm afraid I can't do that.

Thank you.

MR. SALTER: Just to correct one point in Mr. Gould's presentation, Your Honor.

The bank has never conceded that the plan or the trust was created to evade any tax liability whatsoever. We would differ with that. I didn't want to remain silent.

Otherwise, Your Honor, we support the liquidating trustee's position.

MR STETTIN: Since I don't believe any evidence needs to be taken because we have a stipulated set of facts, Judge, I think I am going to need an agreement from Mr. Gould that the recitation of facts which I made in my opening statement to you is correct and can form the basis of any record that the Court needs for its further handling of this case.

THE COURT: Do you find any fault with Mr. Stettin's presentation?

MR. GOULD: No, just to the extent that it's necessary to attribute – to characterize these funds as being taxable income of my bankruptcy estate.

MR. STETTIN: I don't think that is necessary for the determination that I wish the court to make. I will say it's property of his estate and therefore belongs to the liquidating trust.

THE COURT: Do you have any problem with that?

MR. GOULD: No.

THE COURT: All right. I would order you, then, Mr. Gould, to turn over the proceeds in the amount that is presently available, namely $67,500, plus whatever interest accrues, forthwith. I believe you said it was –

MR. GOULD: It's now $68,000. We paid a thousand dollars in expenses, so I've got $1,500 in interest income.

THE COURT: I don't think Mr. Stettin would have any problem with the expense incurred to go in and look at them and hall [sic] them off.

MR. STETTIN: No, sir.

THE COURT: $68,000, if that's an even amount, forthwith.

The Court will determine forthwith to be by Monday at 5 o'clock. Thereafter I would impose, I find you in contempt of court, if it's not done, and impose a sanction of $1,000 a day until such property has been given over to the estate.

MR. STETTIN: Judge, can we have a determination, since Mr. Gould has already indicated he will not abide by this Court's order, that if he does not within a reasonable time after July 31st, 1989 at 5:00 p.m., even in light of the punishment of a thousand dollars a day, that you either certify the respondent up to the district judge for a finding of contempt, which would include incarceration, or that you in fact order incarceration if he fails to abide, if you believe you have the jurisdiction to do it.

THE COURT: I think I have the jurisdiction but to avoid any pitfalls we will refer it up to the District Court.

MR. STETTIN: Yes, sir. I want him to pay the money, I don't want him in jail. Please understand that, Judge. Certainly I need him Tuesday afternoon. Give him until Friday of next week, at the thousand dollars a day, if he does not, then certify it up?

THE COURT: That will be fine.

MR. STETTIN: Thank you, sir.

THE COURT: I think that the feeling of the Court is today being Thursday, certainly we ought to give Mr. Gould enough time to make arrangements to withdraw the money wherever or to do whatever he has to do to procure the funds to comply with the Court's order. Thereafter, a thousand dollars a day and thereafter, after five days, certification to the District Court.

I was interested, Mr. Gould, if I listened carefully, and I did listen carefully to your comments in your deposition about the Court contacting the District Judge and getting him to declare the matter moot.

Was I on the wrong track?

MR. STETTIN: No, what he said was, I think Mr. Gould was saying that he is concerned that if he pays the money over, he moots any appeal that he might have from that order, once he's complied with it.

THE COURT: Read me the colloquy again, please.

MR. STETTIN: I will and here it is. It's on Pages 10 and 11. The question was;

"Q. If ordered by the Court to turn it over, will you turn it over?

"A. No. If ordered by the Court to turn it over or a sanction is imposed upon me for not turning it over, I will not turn it over because my good friends here" –

Meaning Salter and Ziegler.

– "and perhaps you, too" –

Meaning me.

– "or maybe even the Court would then moot or demand that the Court to which we appeal, to which I appeal Judge Weaver's decision moot the appeal and the court above would have to do that on the grounds that it lacked jurisdiction since there would be no dispute, no controversy."

Putting it in his mind, I think Mr. Gould is analogizing this very much to what the Eleventh Circuit did on the order of confirmation, substantial consummation would render any relief that they would give moot.

THE COURT: All right. I didn't want the deposition or the record to reflect that I have any part in the appellate proceedings.

All right. Fine. Thank you all.

MR. STETTIN: Thank you, Judge.

(Whereupon, the hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA)
: SS
COUNTY OF DADE)

I, JACLYN M. OUELLETTE, Shorthand Reporter and Notary Public in and for the State of Florida at Large do hereby certify that I was authorized to and did report in shorthand the proceedings at the foregoing hearing, and that the pages, numbered from 1 through 72, inclusive, contain a full, true and complete transcription of my shorthand report of same.

WITNESS my hand this 11th day of September, 1989.

Jaclyn M. Ouellette

My Commission Expires:
February 14, 1990.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN RE: HOLYWELL CORPORATION, et al., Debtors,	CASE NO. 89-2629-CIV-MARCUS
THEODORE B. GOULD, Appellant, vs. FRED STANTON SMITH, Trustee of the Miami Center Liquidating Trust, Appellee.	

Miami, Florida
October 29, 1990
9:28 a.m.

APPEARANCES:

HERBERT STETTIN, ESQ.
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Miami, Florida 33131
Appearing on behalf of the Appellee

BARRY R. DAVIDSON, ESQ.
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Appearing on behalf of the Bank of New York

THEODORE B. GOULD
2568-D Ivy Road
Charlottesville, Virginia 22901
Appearing pro se

REPORTER: ROBERT A. RYCKOFF
301 North Miami Avenue – Fifth Floor
Miami, Florida 33128

[p. 2] (Call to order of the Court.)

THE COURT: Let me call in Re: Holywell Corporation, 89-2629.

Good morning, folks, and how are you?

This is In Re: Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates, and Theodore B. Gould, debtors.

And I wanted to bring everyone in to see where we stood and what kind of timing made sense for the purposes of scheduling this cause.

As I understand it, the issue is the liquidating trustee is requesting a hearing on the Bankruptcy Court's order of August 14th where there was a certification of contempt against Mr. Gould.

So let me begin. If you folks would be kind enough to state your appearances.

MR. STETTIN: I am Herbert Stettin and I am representing Fred Stanton Smith, who is the trustee of the Miami Center Liquidating Trust.

THE COURT: Good morning to you, sir.

MR. STETTIN: Good morning.

THE COURT: And other counsel.

MR. DAVIDSON: I am Barry Davidson, Judge. I represent Bank of New York.

MR. GOULD: I am Theodore B. Gould and I represent [p. 3] myself.

THE COURT: All right. Where do we stand on the case, folks?

MR. STETTIN: Your Honor, the Bankruptcy Court entered an order finding Mr. Gould in contempt, as you pointed out, dated August 1, 1989.

Thereafter there was an order certifying Mr. Gould to be in contempt, dated August 14th.

And the reason for the two is because the August 1 order gave him a time within which he could purge himself of the contempt. He declined to do so. The Court found that he had failed to do so and said that he should be certified up to this court to be held in contempt as recommended.

The contempt is a fairly basic one and I do not believe that there is a dispute as to the underlying facts.

Mr. Gould, I am sure, is going to be arguing the law that he considers applicable. We respectfully disagree. We are not going to be, in my opinion, relitigating the underlying factual basis.

THE COURT: So how would you have me proceed, Mr. Stettin?

MR. STETTIN: I think that the order is self-explanatory. There is no dispute as to the facts. Mr. Gould, it seems to me, has the burden of showing why he [p. 4] should not be held in contempt by this Court.

THE COURT: Mr. Gould.

MR. GOULD: I have filed objections under Rule 9033 to the order certifying contempt. I don't think that it's necessary to do anything more than have the Court – have Mr. Stettin respond to my objections and give me the opportunity to file a reply brief at that point. As far as I am concerned the Court –

THE COURT: To be disposed of on the papers?

MR. GOULD: Yes.

THE COURT: Do we need argument on it?

MR. GOULD: No. This is a symbolic gesture. I want to take this up to the Eleventh Circuit.

THE COURT: Have you considered the wisdom of retaining a lawyer to represent you?

MR. GOULD: It isn't necessary, Your Honor.

THE COURT: It may not be, but I will ask you whether you –

MR. GOULD: I don't –

THE COURT: Have you considered the wisdom of retaining –

MR. GOULD: I have the issues here.

THE COURT: I raise the issue because I always do when a party proceeds pro se, especially when the issues concern contempt.

[p. 5] MR. STETTIN: You would not be familiar with much of the history of this case, Judge, because you have been fortunate that – as my memory tells me – this is the only one of these that you have ever had on the merits. Every one of the other district courts – district court judges in this district, almost without exception, and some two, three and four times, have had the good fortune to have to deal with parts of this case. This is approximately the 82nd or 83rd separate appellate proceeding to emanate from this case.

The Eleventh Circuit has recently ruled in several of these appeals, and I think what Mr. Gould means when he says that this is symbolic is that those rulings have been adverse, particularly what we call the income tax rulings, and I have got a copy of that opinion, which I was going to leave you anyway. It came out in the last 30 days or so.

THE COURT: In any event, you have considered the wisdom of retaining an attorney and do not wish to do so?

MR. GOULD: Yes, I have. I do not wish to.

THE COURT: All right. Mr. Stettin, he says he has filed his designation of objections and is seeking a response from you.

MR. STETTIN: He has filed objections to the order of contempt and I have no objection to responding in writing.

[p. 6] I will tell the Court that I think you can handle the matter orally as well as you can in writing, Judge. It has been done so many times before.

THE COURT: There is nothing new or different.

How long will it take you – and I will give you whatever time you need – I don't want to put you to any extra work but –

MR. STETTIN: Written response or oral response?

THE COURT: Just a written –

MR. STETTIN: Just a –

THE COURT: Because he said he would want to reply to that anyway, and so just so the record is complete, you can tell me what time frame makes sense for you.

MR. STETTIN: Ten days is fine.

THE COURT: All right. We will give you ten days to file a response to – actually all he has really done is designate the record, but I take it we should –

MR. STETTIN: I do have a document called objections to order of contempt.

MR. GOULD: I filed objections to it.

THE COURT: Then I haven't seen that. When did you file that?

MR. STETTIN: I will tell you the date it was filed. That may help you. It is dated August 10, 1889.

It's possible, Judge, that the clerk of the [p. 7] Bankruptcy Court did not include that.

THE COURT: We have the objections to the order of contempt filed by – that's what you are referring to?

MR. STETTIN: Yes, sir.

THE COURT: And that was submitted pro se by Mr. Gould.

MR. STETTIN: And we did file a response to objections to order of contempt and that was done on about August 21, 1989.

THE COURT: Is there anything further – maybe I am missing something, Mr. Gould. What else is there?

MR. STETTIN: There is not.

The only thing that has come up is a copy of the Eleventh Circuit's opinion on the tax question, which was still open at the time these pleadings were filed. With the Court's permission, I will give it to your clerk.

THE COURT: Sure.

Mr. Gould, let me just sharpen the question then – has he responded or –

MR. GOULD: I am not aware of any response to the objections because I haven't received it.

MR. STETTIN: (Handing to Mr. Gould.)

MR. GOULD: Oh, yes, he has. I am sorry.

THE COURT: Did you want an opportunity to file a response –

[p. 8] MR. GOULD: I guess I would like an opportunity to reply to this, particularly in view of the Eleventh Circuit's –

THE COURT: How much time do you want?

MR. GOULD: Ten days is fine.

THE COURT: All right. We will give you ten days from today to file a reply to his response.

I take it that will do it and we can resolve it on paper and there is nothing further we need do, from everyone's perspective?

MR. STETTIN: Yes.

MR. GOULD: That's correct.

THE COURT: Mr. Davidson.

MR. DAVIDSON: Yes, sir. I would agree. I follow Mr. Stettin's lead.

I am not sure that brief oral argument wouldn't be helpful to –

MR. STETTIN: There is no such thing as brief oral argument in this case, but if you – and I do think oral argument would be useful, but it –

THE COURT: I leave it to counsel. If you want me to set if [sic] for oral argument, I will set it. If you want to rely on the papers, I am happy to proceed by the papers. So it's your call, counsel. If any one of you say I want oral argument, you got it. If not, I will just do it on paper.

[p. 9] MR. STETTIN: We would like it.

MR. GOULD: Let's have it because I want the record of the case.

THE COURT: All right. Pat, can you give me some time. We are going to give him ten days to file a reply. Can you give me a date sometime in the next 30 days or so for argument.

MR. GOULD: Your Honor, it would have to be in December.

THE COURT: Why is that?

MR. GOULD: Because there are three hearings before the Eleventh Circuit the week of November 26th.

THE COURT: You want me to set it in December, Mr. Stettin?

MR. STETTIN: That's fine with me, Judge.

I was aware of two. I wasn't aware of three.

MR. GOULD: Three.

MR. STETTIN: It's hard to keep up, Judge.

THE COURT: Pat, do we have a Friday that we are setting these down for in December?

The 14th?

THE CLERK: Yes, on the 14th. It would be at 1:00 o'clock.

THE COURT: 1:00 o'clock, December 14th.

any problem with that time?

[p. 10] MR. GOULD: No.

THE COURT: Mr. Stettin, that's okay for you?

MR. STETTIN: Not that I am aware of.

THE COURT: Mr. Gould, that's okay for you?

MR. GOULD: That's fine.

THE COURT: Mr. Davidson.

MR. DAVIDSON: Yes, sir.

THE COURT: All right, we will see you folks back here at that time, and we will take your reply – we will ask you, Mr. Stettin, if you would be kind enough to prepare just a simple order indicating the cause had come on in for a conference today. Pursuant to our discussion, we have given Mr. Gould ten additional days to file a reply to your response, and we had set the matter down for the 14th of December at 1:00 o'clock for argument on the contempt motion.

And if you would show that to Mr. Gould or read it to him and to Mr. Davidson before you submit it to us, we would be much appreciative.

MR. DAVIDSON: Your Honor, I apologize –

THE COURT: Sure.

MR. DAVIDSON: – but I did want the record to be clear. This is argument on the contempt recommendation from Judge Weaver.

THE COURT: Correct.

[p. 11] I take it that's the only issue I have in front of me.

MR. GOULD: Yes.

THE COURT: Thank you all much for your time and efforts. We will see you back here on the 14th.

And thank you, Mr. Stettin, for being kind enough to prepare that for us.

(Proceedings concluded at 9:35 a.m.)

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: HOLYWELL CORPORATION, et al., Debtors	:	
THEODORE B. GOULD, Appellant,	:	CASE NO. 89-2629-Civ-Marcus
v.	:	
FRED STANTON SMITH, Trustee of the Miami Center Liquidating Trust, Appellee	:	

MOTION FOR REHEARING

In accordance with Bankruptcy Rules, Rule 8015, Theodore B. Gould, appearing *pro se,* files a motion for rehearing of this Court's order, entered on May 17, 1991, (see attached as Exhibit A) upon the following grounds:

1. It is not possible for Theodore B. Gould to comply with the order of this Court requiring turnover to Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, of the proceeds received from the sale of the concrete pumps, since all of these funds have been used for the payment of attorneys' fees to Arnold & Porter, the debtors' counsel, in the proceedings for filing a petition for writ of certiorari concerning the Eleventh Circuit's divided opinion, cited as *In re Holywell Corp.*, 911 F.2d 1539 (11th Cir. 1990).

It is interesting to note that the Solicitor General of the United States has also filed a petition for writ of certiorari concerning the same issue.[1] The Solicitor General has concluded, in relevant part, as follows, as the principal reason for granting the petition:

> "The decision in this case threatens to create a tax loophole of troubling proportions. *It would allow a liquidating trustee to be appointed in a case under Title 11, take title to the debtor's assets, invest or dispose of those assets in a manner that realizes taxable income, but neither report nor pay the taxes owed on that income.* In reaching this result, the court of appeals ignored the plain language and evident purpose of the statutory provisions that have been enacted by Congress specifically to ensure that such a loophole would not exist." (Emphasis added) *Exhibit B, p. 8.*

This Court's order approving the bankruptcy court's "Order Of Certification Of Contempt," illustrates of the abuses of judicial power arising from the failure to administer the plain language of the bankruptcy statutes and applicable tax laws enacted by Congress:

First. If, as this Court has concluded, "*all* of the debtor's assets (original emphasis) as defined by section 541(a) of the Bankruptcy Code [footnote omitted], are assets of the Miami Center Liquidating Trust," *Order, p. 5,* and the Eleventh Circuit has held that "the government

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[1] "Whether the trustee of the liquidating trust, appointed by the bankruptcy court to receive and dispose of the debtors' assets pursuant to a Chapter 11 plan of reorganization is required to file federal income tax returns on behalf of the debtors and pay the taxes due." *See attached Exhibit B, p. (i).*

[is not] without the ability to collect taxes on the postconfirmation sale of the property[.] . . . [because] *the reorganized debtor, not the liquidating trustee is responsible for such taxes,*" (Emphasis added) *911 F.2d at 1545,* the question must be raised: what is the source of funds for the payment of the taxes? See *Holywell, supra* (Cox dissenting)[2]

Second. If, notwithstanding the plain language of 26 U.S.C. Section 6012(b)(4), the trustee is *not* a fiduciary acting on behalf of the individual debtor's estate and responsible for the payment of the taxes as an *assignee* of the debtor Theodore B. Goulds' property, the historical precedent of the United States Supreme Court precludes the transfer of such property.[3] Furthermore, Mr. Stettin,

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[2] "Although the court encourages us to take consolation in the fact that the government may seek collection of the tax monies from the reorganized debtor, *it remains unclear from where that money will come.*" (Emphasis added) 911 F.2d at 1547.

[3] *See Bramwell v. United States Fidelity & Guaranty Co.,* 269 U.S. 483, 488 (1926), citing *Beaston v. The Bank of Delaware,* 12 Pet. 102, 136 (1838) " . . . *'whenever he [a debtor] is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee of the United States and is bound to pay their debt first out of the proceeds of the debtor's property'.*" (Emphasis added) See also *King v. United States,* 85 S.Ct. 427, 432 (1964) "We agree with Judge Browning, writing in *United States v. Crocker,* 313 F.2d 946, 949, that *'the debts paid by a liquidating receiver [and, we add, distributing agent], like those paid by an executor, administrator, or assignee for the benefit of creditors, are primary obligations of the debtor;* the phrase 'for whom, or for which he acts' should be read as a general acknowledgment of this fact rather than as imposing a restriction upon the reach of Section 192 inconsistent with the overall purpose of this section and Section 191.' *We reject, therefore, the proposition that because distributing agents in*

the attorney for the "liquidating trustee," has, in his Brief In Opposition to the petitions for writ of certiorari filed in the Supreme Court by the debtors and the Solicitor General, distinguished the functions and powers of his client from a "trustee in a case under title 11" based upon the assertion that the individual appointed Trustee of the Miami Center Liquidating Trust lacked "the strong arm authority given trustees under section 544 of the Bankruptcy Code, nor does he have the power to void preferential and fraudulent transfers under Bankruptcy Code sections 547 and 548." *Brief In Opposition, p. 28.* If the Trustee of the Miami Center Liquidating Trust lacks the "strong-arm authority" of a trustee in a case under title 11, he has *no* authority to void any postconfirmation transfer of property of the individual debtor's estate and his consent was not required for the sale of the concrete pumps.

Also, since this Court has held, "all of the debtors' assets . . . are assets of the Miami Center Liquidating Trust," the individual appointed trustee of the Miami Center Liquidating Trust by the bankruptcy court is an "assignee" and a "fiduciary" of Theodore B. Gould's individual estate, and thus responsible under the plain language of 26 U.S.C. Section 6012(b) for filing returns and the payment of income taxes under Section 6151(a). *Otherwise,* title to the concrete pumps has *not* been assigned to the trustee as a Section 541(a) asset of the debtor Theodore B. Gould's estate and the trustee is not entitled

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Chapter XI proceedings act primarily for the court rather than for the debtor they are categorically excluded from the coverage of Section 192." (Emphasis added)

to receive the postconfirmation income from the sale of the concrete pumps as a receiver would. See *Spring Valley Water Co. v. San Francisco,* 246 U.S. 391, 395 (1918).[4]

26 U.S.C. Section 7701(a) (6) defines a "fiduciary" as " . . . a guardian, trustee, administrator, recever [sic], conservator, or any other person acting in a fiduciary capacity for any person," and the applicable Treasury Regulation provides, in relevant part, that a fiduciary " . . . holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest or *receives and controls income of another as in the case of a receiver.*"

2. The second question is: what lawful authority the bankruptcy court had to appoint Fred Stanton Smith as Trustee of the Miami Center Liquidating Trust under the provisions of the Bank's plan, filed on the debtors' behalf, and grant the powers of a receiver to the "liquidating trustee"?

First. 11 U.S.C. Section 105 sets forth the scope of authority granted to a bankruptcy judge within the parameters defined in 28 U.S.C. Section 157, and Secton [sic] 105(b) specifically limits the power of a bankruptcy court, stating that notwithstanding the court's authority to " . . . issue any order, process, or judgment that is necessary or appropriateto [sic] carry out the provisions of this title," a bankruptcy court may not appoint a receiver in a case under this title.

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[4] The term "receiver" has been defined by the Supreme Court as "embracing any person acting as an agent or depository of funds for the court."

Rule 201 of the Rules of Bankruptcy Procedure, as amended, defined the powers and authority of a "receiver" under the Bankruptcy Act of 1989, in relevant part, as follows:

> "Subject to the provisions of this rule, the court may appoint a receiver when necessary in the best interest of the estate (1) to take charge of the property of a bankrupt; (2) to conduct the business of the bankrupt; or (3) to afford representation to the estate in an action, adversary proceeding, or contested matter where no trustee has qualified. . . . [a]nd the authorization to conduct the business of the bankrupt after adjudication shall continue only for such time as may be in the best interest of the estate and consistent with orderly liquidation."

Fred Stanton Smith was granted the powers of a receiver, as the Solicitor General has stated in his petition for writ of certiorari, *see Exhibit A. p. 16,* and was appointed in accordance with 11 U.S.C. Section 1123(a)(7), which allows the contents of a plan to provide for the appointment of a trustee under the plan "consistent with the interests of creditors and equity security holders and with public policy."

Second. The principle of law embodied in the term "public policy" is that no person can lawfully do that which has a tendency to be injurious to the interests of

the State. Furthermore, the courts will not enforce contracts which are unlawful or have a mischievous tendency. See *Bank of the United States v. Owens*, 27 U.S. 527 (1829.)[5]

Third. This Court has clearly erred in citing *Holywell [sic] v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986). The Eleventh Circuit's opinion, in *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d 1547, 1558 (11th Cir.), *cert. denied* 488 U.S. 823 (1988), *vacated* the district court's order affirming the bankruptcy court's order confirming the Bank's plan. Thus, the Eleventh Circuit adopted the standard established by the Supreme Court in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) and "clear[ed] the path for future relitigations of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance"; *accord Deakins v. Monaghan*, 484 U.S. 193, 200 (1988).

Insofar as the appointment of the "liquidating trustee" is concerned, the issue before this Court is of a *jurisdictional* nature and concerns the bankruptcy court's lack of statutory authority to appoint a "receiver." It is *not* frivolous or moot. It can be raised at any time, since a court in a bankruptcy proceeding or case cannot assert authority which it has not been granted or which has been denied. In fact, it is a constitutional principle that the courts of the United States have limited authority

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[5] "Courts are instituted to carry into effect the laws of a country, how can they become auxilliary [sic] to the consummation of violations of law?" *27 U.S. at 538.*

and, in accordance with Article III, Section 2, the jurisdiction of such courts is defined by act of Congress. *Cary v. Curtis,* 3 How. 236, 245 (1845)

3. This Court's reliance upon a provision of the Bank's plan to grant postconfirmation authority to the bankruptcy court to retain jurisdiction over the debtors "in order to enter any order necessary or appropriate to enforce the plan" is clearly *reversible error.*[6]

28 U.S.C. Section 157 defines the jurisdiction of a bankruptcy judge. A bankruptcy court has authority to exercise *in rem* jurisdiction over the debtor's property *prior* to the confirmation of a plan and core proceedings include "matters concerning the administration of the estate," *Section 157(b)(2)(A).* However, as the Eleventh Circuit has held, the administration of the estate ended as an effect of confirmation. *Holywell,* 911 F.2d at 1545 ("[A]dministration of the estate ceases upon confirmation of a plan of reorganization.")

Furthermore, there is a serious question about whether the Bank's plan *is* the "law of the case," *Order, p. 4,* and is binding pursuant to 11 U.S.C. Section 1142, since the Bank's plan did not satisfy the Fair and Equitable Standard. See *In re Holywell Corp.,* 913 F.2d 873, 879 (11th Cir. 1990).[7] The Eleventh Circuit affirmed the *reversal* of

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[6] The bankruptcy court's statutory authority is limited to exercising control of the actions of the "liquidating trustee" in implementation of the Bank's plan.

[7] "At issue in this appeal is whether the Bank's plan complies with the applicable provisions of title 11, namely section 1122. See 11 U.S.C. Section 1129(a)(1) (requiring that the plan

the bankruptcy court's order confirming the Bank's plan, entered on August 8, 1985, 54 B.R. 41 (Bkrtcy. S.D. Fla. 1985), on the grounds that the Bank's plan violated the Miami Center Joint Venture's contractual priority superior to the Bank's liens and the interests of unsecured creditors.

More important, the historical precedent of the Supreme Court has held that if a plan does not provide for the payment of income taxes and the statutory priority of the United States, a court lacks authority to confirm such a plan because it fails to satisfy the Fair and Equitable Standard. See *United States v. Key,* 90 S.Ct. 1049 (1970).[8]

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comply with provisions of title 11). Also at issue is whether the Bank's plan discriminates unfairly with respect to the Miami Center Joint Venture, a creditor who is impaired under and who has not accepted the plan. See 11 U.S.C. Section 1129(b)(1) (requiring that the plan not discriminate unfairly with respect to the classes of impaired claims. . . . If the plan unfairly creates too many or too few classes, or the classifications are designed to manipulate class voting or *if the classification scheme violates basic priority rights, the plan cannot be confirmed.*" (Emphasis added)

[8] "This court has long held that these words, along with the words 'fair and equitable' . . . in no way authorize a district court to errode [sic] priorities otherwise granted by law, and it follows that this language cannot be taken to exclude by implication an explicit statutory priority, such as that granted the United States. . . . In short, the words 'fair and equitable' in Chapter X are terms of art, and no plan can be 'fair and equitable' which compromises the rights of senior creditors in order to protect junior creditors." *90 S.Ct. at 1052.*

The Fair and Equitable Standard includes the Absolute Priority Doctrine under which creditors may participate in the distribution of the proceeds of the sale of the property of a debtor's estate only in accordance with their respective priorities. *Protective Committee v. Anderson*, 390 U.S. 414, 441 (1968)[9]

It is clear that the Bank's plan was a scheme to avoid the payment of income taxes and grant the Bank, as the plan's proponent, postpetition interest on its "undersecured" claim. The Bank of New York has conceded that the purpose of creating the Miami Center Liquidating Trust and the appointment of the Trustee was to *avoid* the payment of income taxes and *defeat* the statutory priority of the United States. However, it is clear that the United States, claim for the payment of income taxes has a statutory priority under 11 U.S.C. Section 503(b)(1)(B) and 507(a)(1), or it has been granted an absolute priority under 31 U.S.C. Section 3713(a). There are *no* other alternatives. A court of the United States should not enforce an unlawful contract as a binding agreement and use its contempt power to require an individual to turn over funds to a bankruptcy court's agent appointed for the

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[9] The Brief In Opposition of Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, to the petitions for writ of certiorari filed by the debtors and the Solicitor General, is based upon the remarkable argument that the tax claim of the United States "does not have priority" on the grounds that the definition in the Bank's plan of an "administrative claim" did not include taxes and the postconfirmation sale of realty is not an administrative expense of the bankruptcy estate entitled to priority under 11 U.S.C. Section 503. *Brief In Opposition, p. 20.*

purpose of engaging in conduct injurious to the interests of the United States.

For the foregoing reasons, Appellant Theodore B. Gould respectfully requests that this Court vacate its order entered on May 17, 1991. A separate motion for a stay pending appeal will be filed if this motion for rehearing is not granted.

Respectfully submitted,

/s/ Theodore B. Gould
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion For Rehearing was sent by regular United States mail on May 24, 1991, to:

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/s/ Theodore B. Gould
Theodore B. Gould, *pro se*

APPENDIX E

STATUTES CITED

RULES OF THE SUPREME COURT

Rule 10

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

* * *

RULES OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

11th Cir. R. 36-1 Affirmance Without Opinion When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment directed verdict or judgment on the pleadings is supported by the record;

(e) judgment has been entered without an error of law;

and an opinion would have no precedential value , the judgment or order may be affirmed or enforced without opinion.

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11 U.S.C. § 541

§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is –

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date –

(A) by bequest, device, or inheritance;

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

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11 U.S.C. § 1142

§ 1142. Implementation of plan.

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

(b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

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26 U.S.C. § 6012 (b)

§ 6012. Persons required to make returns of income

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(b) Returns made by fiduciaries and receivers. –

(1) Returns of decedents. – If an individual is deceased, the return of such individual required under subsection (a) shall be made by his executor, administrator, or other person charged with the property of such decedent.

(2) Persons under a disability. – If an individual is unable to make a return required under subsection (a), the return of such individual shall be made by a duly authorized agent, his committee, guardian, fiduciary or other person charged with the care of the person or property of such individual. The preceding sentence shall not apply in the case of a receiver appointed by authority of law in possession of only a part of the property of an individual.

(3) Receivers, trustees and assignees for corporations. – In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

(4) Returns of estates and trusts. – Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

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28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.